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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 POWER INTEGRATIONS, INC.,

10 Plaintiff,

11 v.

12 FAIRCHILD SEMICONDUCTOR
13 INTERNATIONAL, INC., et al.,

14 Defendants.

Case No. [09-cv-05235-MMC](#)

**ORDER DENYING FAIRCHILD'S
MOTION FOR WAIVER OF
SUPERSEDEAS BOND; SETTING
BOND AMOUNT; EXTENDING
TEMPORARY STAY**

Re: Dkt. No. 1041

15 Before the Court is defendants Fairchild Semiconductor International, Inc.,
16 Fairchild Semiconductor Corporation, and Fairchild (Taiwan) Corporation's (collectively
17 "Fairchild") "Motion for Order Staying Execution of Judgment and Waiver of Requirement
18 to Post Supersedeas Bond." The matter came on regularly for hearing on May 5, 2017.
19 Frank E. Scherkenbach, Howard G. Pollack, and Michael R. Headley of Fish &
20 Richardson P.C. appeared on behalf of plaintiff Power Integrations, Inc. ("Power
21 Integrations"). Blair M. Jacobs and Christina A. Ondrick of Paul Hastings LLP appeared
22 on behalf of Fairchild. The Court, having considered the papers filed by the parties, as
23 well as the arguments of counsel at the hearing, rules as follows.

24 **BACKGROUND**

25 The parties are familiar with the procedural background of the above-titled action.
26 As relevant to the instant motion, the Court, on March 10, 2017, entered final judgment in
27 favor of Power Integrations and against Fairchild in the total amount of \$146,480,598.
28 On March 27, 2017, Fairchild filed a notice of appeal.

By the instant motion, Fairchild asks the Court to stay enforcement of the judgment pending appeal, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, and further asks the Court to waive Rule 62(d)'s typical requirement of a supersedeas bond. By order filed March 29, 2017, the Court temporarily stayed execution of the judgment pending its ruling on the instant motion

LEGAL STANDARD

Rule 62 provides for the circumstances under which a court may "stay the execution of a judgment." Fed. R. Civ. P. 62(b). Under Rule 62(d), "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond."¹ Fed. R. Civ. P. 62(d). "The stay takes effect when the court approves the bond." *Id.* Such bond "protects the prevailing plaintiff from the risk of a later uncollectible judgment and compensates him for delay in entry of the final judgment." *See N.L.R.B. v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988).

"District courts have inherent discretionary authority in setting supersedeas bonds." *Rachel v. Banana Republic, Inc.*, 831 F.3d 1503, 1505 n.1 (9th Cir. 1987). "This includes the discretion to allow other forms of judgment guarantee, and broad discretionary power to waive the bond requirement if it sees fit." *Cotton ex rel. McClure v. City of Eureka, Cal.*, 860 F. Supp. 2d 999, 1027 (N.D. Cal. 2012) (internal quotation and citation omitted).

In determining whether to waive the bond requirement, courts have considered the following factors: "(1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a

¹ The availability of a stay is subject to two exceptions, where the appeal is taken from "an interlocutory or final judgment in an action for an injunction or a receivership," or from "a judgment or order that directs an accounting in an action for patent infringement," neither of which is applicable here. *See* Fed. R. Civ. P. 62(a)(1)-(2), (d).

waste of money; and (5) whether the defendant is in such a precarious financial condition that the requirement to post a bond would place other creditors of the defendant in an insecure position.” See Dillon v. City of Chicago, 866 F.2d 902, 904-05 (7th Cir. 1988) (internal quotation and citation omitted); see also Kranson v. Fed. Express Corp., 11-cv-05826-YGR, 2013 WL 6872495, at *1 (N.D. Cal. Dec. 31, 2013) (noting “[c]ourts in the Ninth Circuit regularly use the Dillon factors in determining whether to waive the bond requirement”). The appellant “has the burden to objectively demonstrate the reasons for departing from the usual requirement of a full supersedeas bond.” Cotton, 860 F. Supp. 2d at 1028 (internal quotation and citation omitted).

DISCUSSION

As noted, Fairchild asks the Court to stay enforcement of the instant judgment pending Fairchild’s appeal and without requiring it to post a supersedeas bond. Should the Court find such bond is required, Fairchild asks the Court to set the amount of the bond at 25% of the full judgment amount and to extend the temporary stay currently in place.

A. Waiver of Supersedeas Bond

In support of its request that the Court waive the bond requirement, Fairchild has submitted evidence as to the financial condition of its parent corporation, ON Semiconductor Corporation (“ON”),² and argues Fairchild and ON “are fully able to satisfy the judgment amount and are in no danger of default or bankruptcy.” (Mot. at 1:18-20.) As Power Integrations points out, however, ON itself has not made an express commitment to satisfy the judgment on behalf of Fairchild. Without such commitment, and given the absence of information as to Fairchild’s own financial status, waiver of the supersedeas bond would not be appropriate. See Cotton, 860 F. Supp. 2d at 1028 (“Until there is absolute certainty that the entity has agreed unconditionally to pay the judgment

² ON’s acquisition of Fairchild was completed on September 19, 2016. (See Colpitts Decl., filed Mar. 27, 2017, Ex. A at 7.)

At the hearing, Fairchild represented that it could provide to the Court and to Power Integrations a commitment from ON that ON will satisfy the judgment within 30 days of the resolution of the appeal of the instant action. Although, to date, that commitment is not reflected in the docket, the Court, for purposes of the following analysis, assumes such documentation would, if requested by the Court, be filed.

9 Turning to the above-listed Dillon factors, the Court, at the outset, finds three
10 factors weigh in favor of the requested waiver. The first two factors, which pertain to the
11 ease of collection, are resolved by ON's commitment, assuming one is made, to pay the
12 full amount of the judgment within 30 days of an affirmance, and the parties agree the
13 fifth factor, potential prejudice to other creditors, is not implicated here. Accordingly, the
14 below discussion focuses on the third and fourth Dillon factors, both of which concern the
15 availability of funds to pay the judgment.

16 In that regard, Fairchild has submitted evidence that ON, at the end of 2016, had
17 “total assets of \$6,924.4 million,” including “\$1,028.1 million in cash and cash
18 equivalents” (see Colpitts Decl., filed Mar. 27, 2017, ¶ 8), and was rated by Moody’s
19 Investor Service as “possess[ing] good liquidity” (see Colpitts Decl., filed Apr. 17, 2017,
20 ¶ 12).³ In response, however, Power Integrations has submitted evidence that ON
21 incurred over \$2 billion in debt to acquire Fairchild (see Colpitts Decl., filed Mar. 27, 2017,
22 Ex. A at 65), had, at the end of 2016, “total liabilities” of \$5,046.5 million (see id. Ex. A at
23 93), and has received ratings that have not been as favorable as the Moody’s rating. In
24 particular, in a January 2017 report issued by Standard and Poors (“S&P”), ON’s financial
25 risk was rated “[REDACTED]” due, in part, to S&P’s expectation that ON “[REDACTED]

³ The report itself has not been submitted, nor has the date of the rating otherwise been provided.

1 [REDACTED]” (See id. Ex. B at 5.) Additionally, although
2 receiving from S&P a liquidity rating of “[REDACTED]” ON, in S&P’s assessment, has not
3 [REDACTED]” (see id. Ex. B at 6), one
4 example being ON’s anticipated use of “[REDACTED]
5 [REDACTED]” (see id.).⁴ Further, Power Integrations
6 has submitted evidence that ON’s “Altman Z-Score,” a “standard method by which to
7 predict future bankruptcies” (see Putnam Decl. ¶ 39), was, as of April 2017, 1.60, which
8 places ON “in Distress Zones” and “implies bankruptcy possibility in the next two years”
9 (see id. ¶ 42, fig. 3).⁵

10 The Court, having considered the evidence submitted by both parties, is not
11 sufficiently confident that ON, irrespective of a commitment as described above, will have
12 the sums available to pay an exceptionally large judgment of \$146,480,598, if such award
13 is affirmed on appeal,⁶ or that the cost of a bond, which, in this case, Fairchild has
14 obtained at what appears to be a favorable rate, would be a waste of money. The third
15 and fourth factors thus weigh against the requested waiver.

16 Under such circumstances, the Court finds Fairchild, in order to stay enforcement
17 of the instant judgment pending appeal, has not “objectively demonstrate[d],” see Cotton,
18 860 F. Supp. 2d at 1028 (internal quotation and citation omitted), sufficient reasons to
19 depart from Rule 62(d)’s typical requirement of a supersedeas bond.

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22 ⁴ The Court, having granted Power Integrations’ motion to file the S&P report
23 under seal based on the confidential nature of its contents, has redacted in the publicly
24 filed version of this order all references to that material and has filed an unredacted
25 version under seal.

26 ⁵ According to Power Integrations’ financial expert, of the ten analog integrated
27 circuit companies for which he obtained Altman Z-Scores, ON’s score was the lowest.
28 (See Putnam Decl. fig. 4.)

⁶ The cases on which Fairchild relies are distinguishable. See Dillon, 866 F.2d at
904-05 (waiving bond for total judgment of \$167,242.12 where City of Chicago had set
aside \$484 million to fund judgments of the type therein at issue); Kranson, 2013 WL
6872495, at *1-2 (waiving bond for judgment against FedEx in amount of \$382,197).

B. Amount of Supersedeas Bond

In its briefing, in response to Fairchild's request that any bond ordered not exceed 25% of the judgment, Power Integrations asked the Court to set such amount at 125% and, at the hearing, revised its request to \$150 million, i.e., approximately 102% of the judgment.

In some cases, as Power Integrations points out, courts have set the amount of the bond at an amount equal to 125% to 150% of the amount of the judgment in order to cover additional costs, primarily attorneys' fees and post-judgment interest. Here, however, the Court did not award attorneys' fees, and the amount of post-judgment interest likely to accrue during the pendency of the appeal is relatively small, approximately "\$3 to 4 million" (see Hearing Tr. at 60:6-8), a sum for which, in all likelihood, sufficient funds will be available.

Accordingly, the bond will be set in an amount equal to the amount of the judgment.

C. Temporary Stay

At the time the Court issued its order temporarily staying execution of the judgment, it did so based on Fairchild's statement that, in the absence of such a stay, ON, in order to avoid being considered in default of an agreement with its lenders, would have to post the very bond for which it seeks a waiver. At the hearing, Fairchild, for the same reasons, asked the Court to extend the temporary stay for a limited period, in order to afford sufficient time for it to obtain and post the bond it has negotiated. The Court finds it appropriate to grant such request and will extend the temporary stay for another thirty days.

CONCLUSION

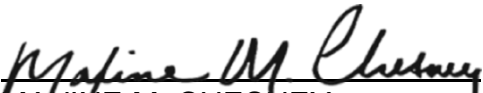
For the reasons set forth above, Fairchild's motion to stay enforcement of the judgment without posting a supersedeas bond is hereby DENIED, the temporary stay previously ordered by the Court is hereby EXTENDED for an additional thirty days to June 26, 2017, and Fairchild, should it wish to maintain the stay pending appeal of the

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instant action, is hereby DIRECTED to post, no later than June 26, 2017, a supersedeas bond in the amount of \$146,480,598.

IT IS SO ORDERED.

Dated: May 26, 2017


MAXINE M. CHESNEY
United States District Judge